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**In United States District Court
For the District of Hawaii**

Deposition of

Wayne Berry
Volume I

CERTIFIED
COPY

May 18, 2005

Wayne Berry

v.

Hawaiian Express Service, Inc.

***A LiveNote World Service Transcript. Reported by CLSP, Ali'i Court Reporting
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Exhibit 45

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21 Also present: Martin G. Walker, Ph.D.

22

23 Videographer: Justin Langlais
24 Certified Legal Video Services
25 1000 Bishop Street, Suite 410
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(808) 530-2587

1 A Yes.

2 Q Was Fleming in business as of February 15th of
3 this year, sir?

4 MR. HOGAN: Objection, calls for speculation,
5 assumes facts not in evidence.

6 A Was Mr. Fleming in business? That's debatable.
7 They still seem to be selling milk here. They've got
8 business licenses all over the country and their
9 corporations are still active, a lot of their, you
10 know, entities. I thought they should have been all
11 closed up. So if I hadn't found all that, I might
12 agree with you.

13 Q (By Mr. Liebeler): What entities of Fleming do
14 you believe were still in operation as of February of
15 2005, sir?

16 MR. HOGAN: Objection, vague as to the term
17 "entities of Fleming."

18 Q (By Mr. Liebeler): You just used the term
19 "entities of Fleming" in your testimony; did you not,
20 sir?

21 A Yes.

22 Q I mean it in that exact sense.

23 A I can't recall all of them, but, as an example,
24 there's one I like to check on, just out of curiosity
25 I looked at a few weeks ago. Fleming Foods in

1 Florida.

2 Q Here you've written you have personal knowledge
3 that Fleming sells to restaurants. Does that Fleming
4 as used in your declaration refer to Fleming Foods
5 Florida?

6 A No.

7 Q What is the personal knowledge that you had as
8 of February of 2005 that Fleming sells, present tense,
9 to restaurants, sir?

10 A Well, the idea that they're a bankrupt entity
11 and they still seem to be going live and strong across
12 the country. My personal knowledge, seems that
13 they're still active here.

14 Q What is your personal knowledge that they are
15 still live and strong across the country, sir?

16 A I just gave you an example.

17 Q Repeat it for me, because I didn't understand
18 it as such, sir.

19 A Well, at the -- at some point in Fleming's
20 bankruptcy -- Who's the Oklahoma attorneys? McAfee &
21 Taft I think, for Fleming? Am I remembering this
22 correctly?

23 Q There is a law firm called McAfee & Taft in
24 Oklahoma, yes.

25 A That's what I'm trying -- I'm trying to

1 remember who they were.

2 I think they went, according to what I
3 read on the internet, they went through and they made
4 deliberate efforts to close or shut down all these
5 entities, as I refer to them, across the country. I
6 believe it was in their time records and it was also,
7 when you followed the time records and you looked at
8 that state's Department of Commerce, you saw that they
9 indeed did shut down the entities, but others they
10 made no attempt, even though a year prior to that they
11 made this monumental attempt to file, you know, things
12 that were late that hadn't been kept up-to-date as far
13 as state filings.

14 So first they make this monumental effort
15 and then later they make this deliberate effort to
16 shut down the entities, but it was sporadic.

17 Q So you infer from McAfee's activity, with
18 respect to either shutting down or not shutting down
19 various corporate entities, that some of those
20 corporate entities continue to actually operate; is
21 that your testimony, sir?

22 A Yes.

23 Q Other than looking at the McAfee & Taft time
24 records, what other personal knowledge do you have of
25 the fact that those companies continue to operate,

1 sir?

2 A The -- Well, again, that was my personal
3 research, that's my personal knowledge, so I think
4 that qualifies. But beyond that, looking at the --
5 and, again, I'm not qualified to do this -- but my
6 interpretation of some of the things that were filed
7 in the bankruptcy as far as Fleming's financial
8 activities, it looked to me as though they were still
9 receiving royalties or some kind of ongoing -- it was
10 some kind of activity where there was new revenue
11 coming in.

12 Q That is your interpretation of records that you
13 looked at in the bankruptcy, correct?

14 A Exactly, and that may not be correct.

15 Q What records are those?

16 A BMC records.

17 Q What specific BMC records?

18 A I don't recall the exact docket numbers.

19 Q Did you retain copies of them?

20 A No, because they're always on BMC.

21 Q Did you retain a list of those BMC docket
22 numbers so that someone following around could try to
23 figure out what exactly you meant?

24 MR. HOGAN: Beg your pardon, Counsel. Someone
25 following you around?

1 MR. LIEBELER: Someone reading his declaration
2 after the fact could figure out exactly what you mean
3 by Fleming continuing to operate.

4 A No. I hadn't thought of that, no.

5 Q (By Mr. Liebeler): Other than unspecified BMC
6 records and records from McAfee & Taft, what other
7 personal knowledge do you have that Fleming continued
8 to operate in February of 2005, sir?

9 MR. HOGAN: I'm going to object as to the term
10 "Fleming." I've objected before, as it is collection
11 of entities in a bankruptcy. Are you referring to
12 Fleming Companies, Inc.?

13 MR. LIEBELER: I'm referring to Fleming in the
14 exact way in which your client has used it in a
15 declaration that he has submitted to the court in this
16 litigation, sir.

17 MR. HOGAN: Very good.

18 A I think one of the best examples is, as I was
19 walking down the street to this deposition this
20 morning, I saw one of those big 53-foot vans cross in
21 front of me at the street corner and it said "Fleming
22 Foods" on the side.

23 Q (By Mr. Liebeler): Do you have personal
24 knowledge as to who owns that van, sir?

25 A No, but I can read "Fleming."

1 Q Do you have personal knowledge as to who
2 operates that van, sir?

3 A No.

4 Q The fact that it just says "Fleming" on the
5 side of it, does that mean to you, sir, that it
6 necessarily means that Fleming is continuing to
7 operate?

8 A I don't think it infers to me that they're not
9 operating.

10 Q That's not my question, sir. Just because you
11 see a van with the word "Fleming" on it driving down
12 the road, do you conclude from that that Fleming is
13 necessarily operating?

14 A It's a good indication.

15 Q Other than McAfee & Taft records, other than
16 the BMC records that you can't tell us any more
17 specifics about, and other than seeing a 53-foot van
18 driving down the street, do you have any other
19 indications that Fleming continued to operate in
20 February of 2005, sir?

21 A I called the phone number on the milk carton
22 where it had "Fleming Foods," and that was just this
23 year.

24 Q And when you called the phone number on the
25 side of the milk carton, who answered the phone, sir?

1 A Some sort of a service. And I asked if it was
2 Fleming and they got real evasive about it. And I was
3 trying to identify -- I said, well, it says "Fleming"
4 on the carton and I'm calling the phone number
5 associated with that. And they kind of went round
6 and round, and then they said they had to get a
7 supervisor, and the conversation really didn't go
8 anywhere.

9 Q Did the person -- Can you identify the person
10 on the other end of the telephone?

11 A I tried to. I tried to ask for identification,
12 and they said that they basically just answer the
13 phone and, you know, some kind of a consumer line or
14 something like that.

15 Q Do you, as you sit here today, have the ability
16 to identify who that individual was?

17 A No, and it wasn't Archie Dykes answering the
18 phone, so, you know.

19 Q I would presume not, Mr. Berry, but you never
20 know with Archie.

21 A That's right.

22 Q Do you know what company -- Strike that.
23 Withdrawn.

24 Did that individual tell you what company
25 that individual worked for?

1 A I believe I asked that question or something
2 like it, and there was not a, there was not a company
3 named as a response. It was just more like, you know,
4 we're answering, you know, on behalf of a Best Yet
5 label or something like that.

6 Q I take it that -- Well, first of all, was the
7 person who answered the phone male or female, just so
8 I can get my pronouns in my questions right?

9 MR. HOGAN: Objection, calls for speculation.

10 A It sounded female. I hope I'm not wrong on
11 that.

12 MR. HOGAN: Just protecting the record,
13 Counsel.

14 MR. LIEBELER: Let's take five minutes, please.
15 Off the record, please.

16 THE VIDEOGRAPHER: The time is 10:06 a.m. and
17 we are off the record.

18 (Break.)

19 THE VIDEOGRAPHER: The time is 10:14 a.m. and
20 we're back on the record.

21 Q (By Mr. Liebeler): Mr. Berry, turning to
22 paragraph 8 of your declaration, it is written there,
23 and I quote, "I believe that Fleming-C&S through their
24 concurrent attorneys are attempting to destroy my
25 relationship Y. Hata," and then it goes on.

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**In United States District Court
For the District of Hawaii**

Deposition of

Wayne Berry
Volume 2

CERTIFIED
COPY

May 19, 2005

Wayne Berry

v.

Hawaiian Express Service, Inc.

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3
4 WAYNE BERRY, a Hawaii CIVIL NO. CV03-00385 SOM LEK
citizen, (Copyright)

5
6 Plaintiff,

7 vs.

8 HAWAIIAN EXPRESS SERVICE,
INC., a California corporation, VOLUME II
et al.,

9 Defendants.

10
11 VIDEOTAPED

12 DEPOSITION OF WAYNE BERRY

13
14 Taken on behalf of Defendants,
15 at the Law Offices of Kobayashi, Sugita & Goda,
16 Suite 2600, 999 Bishop Street, Honolulu, Hawaii,
17 commencing at 1:11 p.m.,
18 on Thursday, May 19, 2005, pursuant to Notice.

19
20 BEFORE: HEDY COLEMAN, CSR #116, RPR, CRR, CM
21 Notary Public, State of Hawaii
22 Certified Shorthand Reporter

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14 Also present: Wayne Berry
15 Martin Walker, Ph.D.

16 Videographer: Robert Whitman
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1 products.

2 Q Did you discuss anything else with the Department
3 of Agriculture, other than the concern about diversions?

4 A No.

5 Q How long ago did you have that communication?

6 A Whenever we had that mad cow was in the news.

7 Q Now, yesterday you mentioned that you have a
8 concern in connection with milk cartons that have Fleming's
9 name on them, and that you had done some investigation
10 relating to that. Do you remember?

11 A Yes.

12 Q Have you contacted the Department of Agriculture
13 or any other entity in connection with the milk labeling
14 that you brought up yesterday?

15 A The Department of Health in Honolulu.

16 Q Okay. So there is a state agency that you have
17 communicated with regarding Fleming, or I guess this would
18 be C&S?

19 A I don't -- I think Fleming -- yeah, you're
20 probably right. The only time Fleming's name was mentioned
21 was the name on the carton. It was more regarding the --
22 the bad milk, and the fact that the shelf life is no good
23 and it all comes over here in one large container. And
24 we're probably the only state where we have double
25 pasteurized milk.

1 Q Okay. So did the Department of Agriculture to
2 your knowledge find any wrongdoing by Fleming or C&S in
3 connection with diversions?

4 MR. HOGAN: Objection; vague as to just -- just
5 Department of Agriculture?

6 MR. SMITH: Correct.

7 A They don't report back to me. I have no
8 knowledge.

9 BY MR. SMITH:

10 Q Okay. And did the State of Hawaii Department of
11 Health have any -- come to any conclusions that anybody had
12 acted improperly in connection with the milk cartons that
13 you found with Fleming's name on them? I apologize.

14 Did the Department of Health come to any
15 conclusion that any wrongdoing had been engaged in
16 with respect to the milk cartons that you had found?

17 A They don't report back to me, either. I have no
18 knowledge.

19 Q You have no knowledge of that. Now, you -- your
20 investigation of those milk cartons, you must have bought
21 some of the milk, is that right?

22 A From time to time, yes.

23 Q And then you scanned the package, the label on the
24 carton in order to get an image of it?

25 A I think at one point Mr. Capozzola, didn't you get

1 a copy of the milk?

2 Q That's why I'm asking. So is that what happened,
3 you scanned the milk carton?

4 A I don't know if I personally did it, but, yes, the
5 milk carton was scanned and sent.

6 Q If you didn't, who did that, Mr. Hogan or Mr.
7 Hogan's office?

8 A It may have been, yes.

9 Q Okay. And then you named the file Moo, or was
10 that Mr. Hogan's office?

11 A I think that was a communication between Mr. Hogan
12 and Mr. Capozzola. I don't -- I don't e-mail Mr. Capozzola
13 directly.

14 Q So the file wasn't named Moo until Mr. Hogan sent
15 it to Mr. Capozzola, is that it?

16 A I don't know that. I may have named it. I don't
17 know who named it.

18 Q Okay. Now, we've remembered the State of Hawaii
19 Department of Health and another entity that you've
20 communicate with. Are there any other state agencies that
21 you've communicated with regarding Fleming or its officers
22 or employees?

23 A That's all I can remember.

24 Q Okay. How about C&S Hawaii, have you communicated
25 with -- other than State Department of Health, have you

1 communicated with any government entities regarding C&S
2 Hawaii?

3 A I'm not sure. They kind of lump together after
4 the asset purchase.

5 Q Okay.

6 A I don't know.

7 Q Well, I'm certainly not looking for you to
8 duplicate anything you told me about already. I guess what
9 I'm asking is, is there anything else -- any other
10 communication you've had with a government entity relating
11 to C&S Hawaii that you haven't already described?

12 A Not that I can recall.

13 Q Okay. Now, is it correct that by reviewing API's
14 business records, one could learn a significant amount about
15 the database that you created for API?

16 MR. HOGAN: Objection; vague as to what significant
17 amount about the database means.

18 MR. SMITH: You may answer.

19 A I'm not sure. They're two separate things.
20 Very -- they're -- there's not much in common between the
21 two.

22 BY MR. SMITH:

23 Q Okay. So -- but if one were to look at all of
24 the -- all of the paper records of API, would that not
25 reveal what data is in the database and something about the